Lembaga Kumpulan Wang Simpanan Pekerja v Adorna Rmit Sdn Bhd & Ors

HIGH COURT (PULAU PINANG) – CIVIL SUIT NO 22–632 OF 2001
KAMALANATHAN RATNAM J
3 NOVEMBER 2003

Companies and Corporations *— Directors — Appointment — Sixth defendant appointed as a director of first defendant — Whether sixth defendant needed to make a statutory declaration pursuant to s 123(4) of the Companies Act 1965 — Companies Act 1965 s 123(4)*

Labour Law *— Provident Fund — Contributions — First defendant failed to pay contributions to Employees Provident Fund — Whether first defendant liable to pay to the fund — Whether second to tenth defendants as directors of first defendant liable to pay to the fund*

Labour Law *— Provident Fund — Contributions — Sixth defendant a sleeping director — Whether sixth defendant liable to pay to the fund*

The plaintiff ('EPF') sued the first defendant as the employer and the second to the tenth defendants as directors of the first defendant. The plaintiff contended that the first defendant was an employer pursuant to s 2 of the Employees Provident Fund Act 1991 ('the Act') and was statutorily bound to contribute monthly towards its employees. The plaintiff claimed that the first defendant failed to pay the sum of RM303,867 due from October 1998 to July 2000 and the second to the tenth defendants being directors of the first defendant were jointly and severally sued pursuant to s 46 of the Act. The learned senior asistant registrar ('SAR') who heard the plaintiff's application for summary judgment granted the plaintiff's orders. The fourth and sixth defendants appealed. The court then heard the fourth defendant's appeal first and dismissed it with costs. The sixth defendant stated that he was informally appointed as a director for the purpose of re-negotiating a joint venture agreement. He also stated that he held neither shares nor equity in the first defendant and was not involved in the day to day running of the first defendant. He also contended that neither he nor the first defendant had complied with s 123(4) of the Companies Act 1965.

Held, dismissing the sixth defendant's appeal:

(1) It is a requirement of s 123(4) that the sixth defendant make the statutory declaration in that section of the Companies Act 1965. He had not done so. The sixth defendant wanted to use his own default as a defence. If such an argument was accepted then every director will with impunity refuse to comply with the mandatory requirements of the Act and set up such defaults as defences. In fact on his own admission, the sixth defendant could be charged for an offence under s 369 of the Companies Act 1965 (see p 733C–D).

(2) The sixth defendant further submitted that there was a tacit understanding between him and the fellow directors that he was only appointed to negotiate. Yet other than his own self-serving affidavit, none of the other directors filed any affidavit in support of the sixth defendant's contention. There was neither a resolution nor any minutes exhibited in any of the affidavits to this effect (see p 733H).

(3) The relevant section relied on by the plaintiff was sufficient to include the directors' liability which was joint and several, in the event the company failed to pay the EPF dues (see p 734A).

(4) Directors are the alter ego of a company. It is therefore not appropriate for a director to attempt to escape culpability by pleading that he is a sleeping partner or director, or a silent director or a non-active director (see p 734B).

[Bahasa Malaysia summary

Plantif ('KWSP') telah menyaman defendan pertama sebagai majikan dan defendan-defendan kedua hingga kesepuluh sebagai pengarah-pengarah defendan pertama. Plaintif menyatakan bahawa defendan pertama adalah majikan seperti di dalam s 2 Akta Kumpulan Wang Simpanan Pekerja 1991 ('Akta tersebut') dan hendaklah menyumbang setiap bulan kepada pekerja-pekerjanya. Plaintif menyatakan bahawa defendan pertama gagal membayar jumlah RM303,867 yang kena dibayar sejak Oktober 1998 hingga Julai 2000 dan defendan-defendan kedua hingga kesepuluh sebagai pengarah-pengarah defendan pertama adalah bersesama dan berasingan bertanggungjawab menurut s 46 Akta tersebut. Penolong kanan pendaftar yang arif ('PKP') yang telah mendengar permohonan plaintif untuk penghakiman terus memberikan perintah yang dipohon plaintif. Defendan-defendan keempat dan keenam merayu. Mahkamah telah mendengar rayuan defendan keempat dan telah menolak rayuan itu dengan kos. Defendan keenam menyatakan bahawa beliau telah dilantik secara tidak rasmi sebagai pengarah untuk merundingkan perjanjian usahasama. Beliau juga menyatakan bahawa beliau tidak memegang saham ataupun ekuiti di dalam defendan pertama. Beliau juga tidak terlibat dalam pengurusan hari ke hari defendan pertama. Beliau juga menyatakan bahawa beliau dan defendan pertama tidak mematuhi s 123(4) Akta Syarikat 1965.

Diputuskan, menolak rayuan defendan keenam:

(1) Ia adalah keperluan s 123(4) bahawa defendan keenam membuat akuan berkanun di dalam seksyen itu di dalam Akta Syarikat 1965. Beliau tidak berbuat sebegitu. Defendan keenam hendak menggunakan keingkaran beliau sebagai pembelaan. Jika hujah seperti itu diterima semua pengarah akan enggan mematuhi peruntukan mandatori Akta tersebut dan menggunakan

keingkaran seperti itu sebagai pembelaan. Pada pengakuan beliau sendiri, defendan keenam boleh dituduh untuk kesalahan di bawah s 369 Akta Syarikat 1965 (lihat ms 733C–D).

(2) Defendan keenam telah berhujah bahawa terdapat persefahaman yang tidak dikata-kata di antara beliau dengan pengarah-pengarah lain bahawa beliau hanya dilantik untuk merunding. Walau bagaimanapun selain daripada afidavit untuk diri beliau sendiri tiada pengarah-pengarah lain yang memfailkan afidavit untuk menyokong pernyataan defendan keenam. Tiada ketetapan atau minit-minit yang diekshibitkan di dalam afidavit-afidavit kepada perkara ini (lihat ms 733H).

(3) Seksyen yang relevan yang plaintif bergantung kepada adalah mencukupi untuk memasukkan liabiliti bersesama dan berasingan pengarah-pengarah jika syarikat itu gagal membayar kepada KWSP (lihat ms 734A).

(4) Pengarah-pengarah adalah alter ego sesuatu syarikat. Ia tidak berpatutan untuk seorang pengarah untuk cuba melepaskan diri daripada kebersalahan dengan memohon bahawa beliau adalah pekongsi atau pengarah lelap atau pengarah yang tidak aktif (lihat ms 734B).]

Notes

For cases on appointment of directors, see 3 Mallal's Digest (4th Ed 2000 Reissue) paras 124-128.

For cases on contributions to the Provident Fund, see 8 Mallal's Digest (4th Ed 2001 Reissue) paras 1362-1364.

Legislation referred to

Companies Act 1965 ss 123(4), 125, 130, 369
Employees Provident Fund Act 1991 ss 2, 43, 45, (3), 46, 49,
Employees Provident Fund Rules 1991 r 3

Jamal Nasser Abd Ghani (Pegawai Undang-Undang Kanan, Jabatan Undang-Undang, Kumpulan Wang Simpanan Peker ja, Kuala Lumpur) for the plaintiff.

Jagjit Singh Sidhu (*JS Sidhu & Assoc*) for the sixth defendant.

Kamalanathan Ratnam J:

Facts

The plaintiff ('EPF') sued the first defendant as the employer and the second to tenth defendants as directors of the first defendant. The plaintiff contended that the first defendant was an employer pursuant to the definition as contained in s 2 of the Employees Provident Fund Act 1991 ('the Act') and was therefore statutorily bound to contribute monthly

towards its employees. Pursuant to ss 43 and 45 of the Act, the first defendant was duty bound to remit to the plaintiff its contribution and that of the employees within the time stipulated under r 3 of the Employees Provident Fund Rules 1991. The stipulation was that such remittance must be made to the plaintiff not later than 21 days from the last date of each month. It was the plaintiff's case that the first defendant had failed to remit the said contributions from October 1998 to July 2000 amounting to RM303,867 and the plaintiff particularized the sums due monthly, in its statement of claim.

Section 45(3) of the Act also stipulated that in the event the employer failed to pay the due contributions within the time stipulated, then the said employer must pay as additional contribution, a sum equivalent to the dividend paid out by the plaintiff for the year concerned. The plaintiff also pleaded that the dividend it paid out for the year 1998 was 6.7%, for 1999, 6.84% and for the year 2000, 6%pa.

Section 49 of the Act further stipulated that in the event an employer failed within the stipulated time to contribute under s 45 of the Act, then the said employer shall pay by way of additional interest, the interest specially declared by the plaintiff which for the period 1 September 1998 to 20 March 2000 was 7.7% and from 21 March 2000 to 25 February 2001 was 7.84%pa.

Plaintiff's case

It is the plaintiff's case that the first defendant had failed to pay the sum of RM303,867 due from October 1998 to July 2000.

The second to the tenth defendants being directors of the first defendant were jointly and severally sued pursuant to s 46 of the Act for the contributions remaining unpaid by the first defendant amounting to the same figure.

Findings of the court

The learned senior assistant registrar ('SAR') who heard the plaintiff's application for summary judgment granted the plaintiff's orders. Before me only the fourth and sixth defendants appealed against the learned SAR's decision. By request of parties, I heard encl 36, which is the fourth defendant's appeal first. After hearing submissions from both parties, I dismissed encl 36 with costs. Since the fourth defendant has not appealed against my said judgment, I shall move on to the appeal by the sixth defendant which is encl 35.

Dr Jagjit Singh Sidhu an advocate and solicitor who was the sixth defendant, appeared in person. He put his case very simply. He contended that he was appointed informally as a director of the first defendant for the sole purpose of re-negotiating a joint-venture agreement between the first defendant, the eighth defendant, Adorna Education Sdn Bhd, Yayasan Bumiputra Pulau Pinang Bhd, Royal Melbourne Institute of Technology and RMIT (Malaysia) Sdn Bhd. He also contended that he held neither

A shares nor equity in the first defendant. He was also not involved in the day to day running of the first defendant, nor had he received any remuneration from the first defendant. He also submitted that neither he nor the first defendant had complied with the requirement of s 123(4) of the Companies Act 1965 which reads as follows:

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> Every person shall before he is appointed a director of a company make and lodge with the Registrar [and the Official Receiver] a statutory declaration in the form prescribed by regulations that he will not be acting in contravention of sections 125 and 130 [and that he consents to act as a director of the company.]

C (Section 125 prohibits an undischarged bankrupt from acting as a director except with the leave of the court. Section 130 deals with the restrictions of a convicted person from acting as a director or promoter of a company).

It is a requirement of s 123(4) that the sixth defendant make the said statutory declaration. He has not done so. Now he wants to use his own default as a defence. If such an argument is accepted then every director will D with impunity refuse to comply with the mandatory requirements of the Act and set up such defaults as defences. In fact on his own admission, the sixth defendant could be charged for an offence under s 369 of the Companies Act 1965 which reads as follows:

> (1) A person who —
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> (a) does that which by or under this Act he is forbidden to do;
> (b) does not do that which by or under this Act he is required or directed to do; or
> (c) otherwise contravenes or fails to comply with any provision of this Act,
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> F shall be guilty of an offence against this Act.
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> (2) A person who is guilty of an offence against this Act shall be liable on conviction to a penalty or punishment not exceeding the penalty or punishment expressly mentioned as the penalty or punishment for the offence, or if a penalty or punishment is not so mentioned, to a penalty not exceeding [five thousand ringgit.]
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> (3) The penalty or punishment, pecuniary or other, set out in, or at the foot of, any section or part of a section of this Act shall indicate that the offence is punishable upon conviction by a penalty or punishment not exceeding that so set out and where the penalty or punishment is expressed to apply to a part only of
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> H the section, it shall apply to that part only.

Dr Sidhu further submitted that there was a tacit understanding between him and the fellow directors that he was only appointed to negotiate. Yet other than his own self-serving affidavit, none of the other directors filed any affidavit in support of the sixth defendant's contention.

I Further there was neither a resolution nor any minutes exhibited in any of the affidavits to this effect. At the close of the sixth defendant's submission, I did not wish to hear from the respondent.

In my view, the relevant section relied on by the plaintiff is sufficient to include the directors' liability which is joint and several, in the event the Company namely the first defendant in this case failed to pay the EPF dues. This is a unique section which is peculiar to this Act. It is a sensible section which ensures that directors owe a duty to see to it that the companies' employees' compulsory savings are protected. Directors are the alter ego of a company. It is therefore not appropriate for a director to attempt to escape culpability by pleading that he is a sleeping partner or director, or a silent director or a non-active director.

I had no hesitation in dismissing the sixth defendant's appeal with costs.

Sixth defendant's appeal dismissed with costs.

Reported by Chew Phye Ken